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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS MANUEL TAPIA, Defendant and Appellant.	B168657 (Los Angeles County Super. Ct. No. BA232083)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruffo Espinoza, Judge. Affirmed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Ana R. Duarte and James William Bilderback II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III.B and III.C of the Discussion.

I. INTRODUCTION

Defendant and appellant Jesus M. Tapia pointed a firearm at another motorist during a traffic dispute. When officers came to Tapia's residence the next day to investigate, they observed Tapia, who was standing on the sidewalk in front of his residence, remove a loaded handgun from his pocket and place it inside a vehicle parked in the driveway. The sidewalk where Tapia had been standing was within 1,000 feet of a high school. Tapia was convicted of possession of a firearm in a school zone, in violation of Penal Code section 626.9,[1] and assault with a firearm. At trial, he sought to present, as a defense to the section 626.9 charge, evidence that the sidewalk where he had been standing was on private property, subject to an easement of way granted to a public entity. In the published portion of this opinion, we conclude a sidewalk on an easement of way granted to a public entity does not qualify as private property within the meaning of section 626.9, subdivision (c)(1). In the unpublished portion of this opinion, we reject Tapia's contention that the trial court improperly denied *Pitchess*[2] discovery and limited cross-examination of a witness. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts.*

1. *People's case.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence relevant to the issues on appeal established the following. At approximately 11:00 p.m. on May 25, 2002, Angel Luggo was double-parked in front of his residence on East 40th Place

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1 All further undesignated statutory references are to the Penal Code.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

in Los Angeles, talking to Jose Mecina. Tapia was driving down the street in a sport utility vehicle (SUV) belonging to Ricardo Santoyo, who was a passenger in the SUV. Tapia honked and told Luggo to move his car. Mecina stated, "[t]he street is free," and told Tapia to go around. Tapia exited his vehicle and asked, " 'Are you talking back to me?' " Mecina replied affirmatively, and the two men argued. Tapia punched Mecina. Tapia then pointed a gun at Luggo and told him to move his car. Luggo complied.[3]

In response to Luggo's complaint to police, the next day, May 26, 2002, Los Angeles Police Officers Charles Wunder and Lyman Doster went to the area of 40th Place where the incident had occurred. They observed Tapia, who matched the assailant's description, and Santoyo standing in front of Tapia's residence at 1257 East 40th Place, near a brown Chevrolet Suburban SUV. Santoyo was standing inside the gate on the actual property. Tapia was standing on the sidewalk behind the SUV. As the police car approached, Tapia walked from the sidewalk to the SUV, pulled a loaded blue steel handgun from his pants pocket, and placed it on the front seat of the SUV. To keep Tapia and Santoyo off guard, Doster asked whether the men were stripping a car. Both men were detained and handcuffed.

The sidewalk in front of Tapia's residence, where Tapia had been standing with the gun in his pocket, was 282 feet from Jefferson High School.

2. *Defense case.*

Tapia testified that he had been driving his wife home in Santoyo's vehicle when he encountered Luggo's vehicle blocking the street. He could not get around the car without hitting Luggo's vehicle. Tapia honked, and Mecina stated, "This is my block." Tapia exited his car and approached Mecina, but Mecina

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[3] Santoyo denied at trial that Tapia had pulled a gun on Luggo. However, he admitted telling police that Tapia had pulled out a firearm during the incident. Mecina stated that Tapia had a cellular telephone, not a gun, in his hand.

"came at" Tapia. Tapia put his hand up to protect himself and Mecina backed away. Tapia asked, "What's your problem." He did not possess or point a gun, although he did have a cellular telephone in his hand. Santoyo corroborated this account, as did Tapia's wife Adriana.

As to the next day's events, Tapia testified that when officers first approached, he was "inside of the yard opening the wrought iron fence" to allow access to the SUV. The gun found in the vehicle was Santoyo's, and Tapia had not been holding it at any time that day. Santoyo testified that he placed the gun in his vehicle on May 26, the day after the encounter with Luggo. He was in the process of putting his gun in the car in its case when police pulled up. He placed it on the seat because he did not have time to finish putting it in the case. Santoyo had not given the gun to Tapia.

Tapia admitted that he did not have a concealed weapon permit or permission from the school district to carry a firearm.

B. *Procedure.*

Trial was by jury. Tapia was convicted of possession of a firearm in a school zone (§ 626.9, subd. (b)) and assault with a firearm (§ 245, subd. (a)(2)). The jury found true an allegation that Tapia personally used a firearm, a handgun, during commission of the assault. (§ 12022.5, subd. (a).) Tapia was placed on probation for three years on condition he serve 365 days in county jail. The trial court also imposed a restitution fine and assessed a suspended parole revocation fine. Tapia appeals.

III. DISCUSSION

A. *Preclusion of private property defense.*

1. *Section 626.9 and the trial court's ruling.*

As noted, Tapia was charged with violation of the Gun-Free School Zone Act of 1995, section 626.9. Section 626.9 prohibits possession of a firearm in an area that the person knows or reasonably should know is a school zone, without

permission from specified school authorities.[4] (§ 626.9, subd. (b).) "School zone" is defined as "an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school." (§ 626.9, subd. (e)(1).) The statute contains several exceptions.[5] Relevant here is subdivision (c)(1), which provides that "Subdivision (b) does not apply to the possession of a firearm under any of the following circumstances: [¶] (1) Within a place of residence or place of business *or on private property, if the place of residence, place of business, or private property is not part of the school grounds and the possession of the firearm is otherwise lawful*." (Italics added.)

The defense theory was that the sidewalk where officers observed Tapia with the gun on May 26, 2002 was private property, and section 626.9 was therefore inapplicable. Before trial began, Tapia's counsel indicated he intended to present testimonial and documentary evidence to establish that Tapia's father possessed title to the property at 1257 East 40th Place "out to the curb," subject to a public easement for the sidewalk. The prosecutor, on the other hand, sought a

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[4] Section 626.9 provides in pertinent part: "(a) This section shall be known, and may be cited, as the Gun-Free School Zone Act of 1995. [¶] (b) Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished as specified in subdivision (f). [¶] (c) Subdivision (b) does not apply to the possession of a firearm under any of the following circumstances: [¶] (1) Within a place of residence or place of business or on private property, if the place of residence, place of business, or private property is not part of the school grounds and the possession of the firearm is otherwise lawful."

[5] Among other things, the statute excepts from its scope existing shooting ranges, certain peace officers and military personnel, security guards, and persons licensed to carry firearms pursuant to section 12050 et seq. (§ 626.9, subds. (c)(4), (l),(m), (n), (o).) Subdivision (c)(3) additionally contains an exception for persons who reasonably believe they are in grave danger, under specified circumstances.

ruling that the sidewalk was public, not private, property as a matter of law within the meaning of section 626.9.

After hearing the parties' arguments, the trial court concluded the sidewalk was public property for purposes of section 626.9. It explained, "I think the letter and spirit of this statute contemplates the protection of children. And otherwise that's what this statute is directed to, is keeping people from possessing . . . guns in a school zone. . . . [¶] I'm going to tell you right now my decision is that it is public property, regardless of whether your client has an easement or has title to that property or not. I don't believe that your client had anything to do with construction of the sidewalk. And I can see by looking [at a photograph of the area] that the sidewalk runs throughout the whole neighborhood. So it must have been done for a common purpose, and it runs directly right in front [of] the high school or the school that the statute seems to be protecting." The trial court observed that the general public, as well as schoolchildren, used the sidewalk.

The trial court subsequently instructed the jury, "Possession of a firearm within a school zone is not unlawful if the firearm is being lawfully transported or if the firearm's possession is within a place of residence or on private property, providing the place of residence or private property is not part of the school grounds. Possession of the firearm within a school zone is otherwise not lawful." "*If you find, beyond a reasonable doubt, that the sid[e]walk in front of 1257 East 40th Place, Los Angeles, California, is a public place, then that sidewalk is not private property within the meaning of Penal Code Section 626.9(b). [¶] The term 'public place' means any place which is open to common or general use, participation and enjoyment by members of the public*." (Italics added.)

2. *Discussion.*

Tapia contends both the exclusion of the proffered evidence and the instruction were erroneous, and the purported errors deprived him of his constitutional right to present a defense. (See, e.g., *People v. Cash* (2002) 28

Cal.4th 703, 727.) We agree that a portion of the trial court's instruction was erroneous. However, we conclude that, as a matter of law, a sidewalk on an easement of way which has been granted to a public entity is not private property within the meaning of section 626.9.[6] The trial court's error was therefore harmless beyond a reasonable doubt, and Tapia was not prevented from presenting a viable defense.

a. *A sidewalk on an easement of way granted to a public entity is not "private property" within the meaning of section 626.9.*

When interpreting a statute, we are guided by the familiar principle that we must ascertain the Legislature's intent so as to effectuate the purpose of the law. (*People v. Leal* (2004) 33 Cal.4th 999, 1007; *People v. Lopez* (2003) 31 Cal.4th 1051, 1056; *People v. Toney* (2004) 32 Cal.4th 228, 232.) "In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.] 'If, however, the language supports more than one reasonable construction, we may consider "a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citation.]' " (*People v. Lopez, supra,* at p. 1056; *In re Young* (2004) 32 Cal.4th 900, 906; *People v. Jefferson* (1999) 21 Cal.4th 86, 94.) We examine the statutory language in the context in which it appears, and adopt the construction that best harmonizes the statute internally and with related statutes. (*People v. Jefferson, supra,* at p. 94; *In re Danny H.* (2002) 104 Cal.App.4th 92, 97.)

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6 As the proffered evidence was excluded, it is unclear whether Tapia's father actually had title to the property, and how the easement was created. For purposes of argument, we assume Tapia would have been able to prove his father possessed title to property as represented, and that the sidewalk was on an easement of way granted to a public entity.

Under the facts presented here, the sidewalk was clearly neither a place of business nor a place of residence. Our task, therefore, is to determine whether it qualified as "private property" within the meaning of section 626.9, a question which appears to be an issue of first impression. Although section 626.9 contains definitions of several terms used therein, "private property" is not among them. (See § 626.9, subds. (e)(1) [defining school zone]; (e)(2) [defining firearm]; (e)(3) [defining locked container]; (e)(4) [defining concealed firearm].)

The trial court, through its jury instruction, concluded the sidewalk was *not* private property within the meaning of section 626.9 if it was a "public place," i.e., an area "open to common or general use, participation and enjoyment by members of the public." (See CALJIC No. 16.431.) The Legislature has often employed the term "public place," or "public area," in the Penal Code. (See *In re Danny H.*, *supra*, 104 Cal.App.4th at pp. 98-100.) When construing statutes forbidding certain behavior in a "public place" or "public area," California courts have routinely held that privately-owned property can constitute a public place. In *In re Danny H.*, *supra*, at pages 104-105, for example, we considered whether a railroad trestle was a public place for purposes of section 594.1, subdivision (e)(1), which prohibits a person under 18 from possessing an aerosol container of paint for the purpose of defacing property while on, inter alia, any public place. (*Id.* at p. 97.) We concluded that, based upon the totality of the circumstances, the trestle was a public place for purposes of section 594.1, subdivision (e)(1). (*Id.* at pp. 105-106.) The fact the railroad trestle was private property did not preclude a finding it was a public place, where the trestle was unenclosed, visible to the public, and readily accessible. (*Ibid*.)

In *People v. Jimenez* (1995) 33 Cal.App.4th 54, 59-60, the defendant sold narcotics in a residential driveway within 1,000 feet of a school, while classes were in session. His sentence was enhanced pursuant to Health and Safety Code section 11353.6, which applied, inter alia, to the sale of controlled substances

within public areas within 1,000 feet of schools. (*Id.* at pp. 57-58.) The court concluded the residential driveway was a public area within the meaning of Health and Safety Code section 11353.6. (*Id.* at p. 60.) It reasoned that "public area" was not synonymous with "public property." (*Id.* at p. 59.) Instead, for purposes of section 11353.6, "public area" encompassed not only publicly-owned locations "such as streets, sidewalks and bus stops" but also "those portions of private property which are readily accessible to the public." (*Id.* at p. 60 [collecting cases]; see, also, e.g., *In re Zorn* (1963) 59 Cal.2d 650, 652 [a barbershop was a public place for purposes of ordinance prohibiting willfully and unlawfully appearing in a state of intoxication in a public place open to public view; the barbershop was "Common to all or many; general; open to common use" and open to common participation and enjoyment]; *People v. Vega* (1971) 18 Cal.App.3d 954, 958 [market parking lot, being accessible to members of the public having business with the market, was a public place for purposes of section 12031, which prohibited carrying a loaded firearm in a vehicle while in a public place]; *People v. Perez* (1976) 64 Cal.App.3d 297, 301 [apartment hallway was a public place because it was readily accessible to all who wished to go there]; *People v. Olson* (1971) 18 Cal.App.3d 592, 598 [driveway, lawn, and porch in front of defendant's house were public places for purposes of section 647, subdivision (f), in that they were accessible and open to common or general use]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657-659 [defendant found intoxicated inside a private automobile parked along a public street was in a public place, for purposes of section 647, subd. (f); public streets, highways, and sidewalks are public places]; *People v. Green* (1971) 15 Cal.App.3d 766, 771 [hospital parking lot, accessible to members of public having business with the hospital, was a public place]; cf. *People v. White* (1991) 227 Cal.App.3d 886, 890-893 [defendant's fenced front yard, containing three dogs which acted as deterrents to public access, was not a

public place for purposes of section 647, subdivision (f), even though the yard was open to public view].)

The difficulty with the trial court's application of these principles to the instant case is that, unlike the statutes at issue in the aforementioned authorities, section 626.9 does not use the terms "public place" or "public area." To the contrary, section 626.9 creates an exception for firearm possession on "private property." "When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning. [Citation.]" (*People v. Trevino* (2001) 26 Cal.4th 237, 242; see also *People v. Bland* (2002) 28 Cal.4th 313, 337 [" ' " 'It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.' " [Citation.]' "]; *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) That the Legislature did not necessarily intend section 626.9 to be governed by the "public place" analysis is also suggested by the exception for places of business. It is readily apparent that a great many places of business are open to common use and enjoyment by members of the public. Nonetheless, section 626.9's exception expressly encompasses places of business.

Webster's Dictionary defines "private" as, among other things, "single, private, set apart, for himself"; "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public"; or "belonging to or concerning an individual person, company, or interest." (Webster's 3d New Internat. Dict. (1993) pp. 1804-1805.) Black's Law Dictionary defines "private" as, inter alia, "[r]elating or belonging to an individual, as opposed to the public or the government." (Black's Law Dict. (7th ed. 1999) p. 1213.) Private property is defined as "[p]roperty -- protected from public appropriation -- over which the owner has exclusive and absolute rights."

(Black's Law Dict., *supra*, at p. 1233.) Civil Code section 669 provides that, "All property has an owner, whether that owner is the State, and the property public, or the owner an individual, and the property private." Civil Code section 654 states, "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property." Thus, two interpretations of the phrase "private property" are possible: one focused on ownership, the other focused on the use made of the property.

Prior to its amendment in 1994, section 626.9 prohibited firearm possession on school grounds. (*People v. Mejia* (1999) 72 Cal.App.4th 1269, 1271-1272.) In 1994, the Legislature expanded the scope of the statute to prohibit firearm possession, not only on school grounds, but within a 1,000-foot "school zone" around campuses. (*Id.* at pp. 1271-1272; Stats. 1994, ch. 1051, § 1, pp. 6191-6193.) The purpose of the law, as articulated by its author, Assemblywoman Doris Allen, was to foster school safety and decrease violence on school campuses. (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 645 (1993-1994 Reg. Sess.) Jan. 11, 1994, p. 2; Sen. Com. on Judiciary, Background Information Form on Assem. Bill No. 645 (1993-1994 Reg. Sess.); Assemblywoman Allen, letter to Governor Wilson, Sept. 8, 1994 [stating that Assembly Bill No. 645 would make schools safer].) On the other hand, a letter from Assemblywoman Allen to Governor Wilson, urging him to sign the legislation, indicates the bill's author was "very conscientious about protecting the rights of gun-owners." (Assemblywoman Allen, letter to Governor Wilson, Sept. 8, 1994, *supra*.) To that end, the author stated the bill included "several provisions" to ensure "law abiding citizens would not be unjustly penalized under the bill." (*Ibid.*)

The legislative history of the Gun-Free School Zone Act of 1995 further indicates the law was modeled after former 18 United States Code section 922(q),

the "Gun-Free School Zones Act of 1990." (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 645 (1993-1994 Reg. Sess.), Jan. 11, 1994, pp. 2- 3; Assemblywoman Allen, letter to Governor Wilson, Sept. 8, 1994, *supra* [stating that Assembly Bill No. 645 codified "the federal 1,000 foot gun-free zone law . . ."].) The federal statute was concerned with protecting school children from gun-related violence on or near schools. (*U.S. v. Campbell* (8th Cir. 1994) 12 F.3d 147, 148.) It prohibited possession of firearms in school zones (18 U.S.C. § 922(q)(1)(A)), defined as "in, or on the grounds of, a public, parochial or private school' or 'within a distance of 1,000 feet from the grounds of a public, parochial or private school.' [18 U.S.C.] § 921(a)(25)." (*United States v. Lopez* (1995) 514 U.S. 549, 551 & fn.1.) The federal statute provided that it did not apply to the possession of a firearm "on private property not part of school grounds." (18 U.S.C. § 922(q)(1)(B)(i) (1988 ed., Supp. V.) In 1995, the United States Supreme Court invalidated former 18 United States Code section 922(q), holding that in enacting the statute, Congress had exceeded its authority to regulate state commerce. (*United States v. Lopez, supra,* 514 U.S. at pp. 551, 561.) Our research has disclosed no helpful interpretation by the federal courts of the federal "private property" exception which could shed light on the California Legislature's use of that term.

Early drafts of Assembly Bill No. 645 mirrored the federal statute's language in regard to the private property exception, i.e., that the prohibition on firearm possession within 1,000 feet of a school did not apply "[o]n private property not part of school grounds." (See, e.g., Assem. Bill No. 645, as amended Jan. 3, 1994.) Assembly Bill No. 645 was eventually amended in the Senate to clarify that the private property exception included a " 'residence or place of business' as well as private property if other conditions are met." (Sen. Com. on Judiciary, Analysis of Sen. Floor Amends. to Assem. Bill No. 645; Sen. Amend. to Assem. Bill No. 645 (1993-1994 Reg. Sess.) Aug. 22, 1994.) From the legislative

history, therefore, the most we can reasonably glean is the unsurprising fact that the intent of the Legislature in enacting the law was to further the safety of students at and on their way to and from school.

A similar "private property" exclusion is contained in section 12026. Section 12025 prohibits carrying a concealed firearm. (§ 12025, subd. (a).) Section 12026 creates an exception to section 12025, providing that the prohibition on carrying a concealed firearm does not apply to United States citizens or legal residents over 18,[7] who carry a concealable firearm, "either openly or concealed, anywhere within the citizen's or legal resident's *place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident . . . .*" (Italics added.) Likewise, section 12031 prohibits the carrying of a loaded firearm, subject to various exceptions. (§ 12031, subd. (a)(1).) Section 12031, subdivision (h), provides that the statute does not prohibit "any person in lawful possession of private property from having a loaded firearm on that property." The case law construing these provisions, however, sheds little light on the meaning of private property under the circumstances presented here.

However, resolution of the instant matter does not require that we determine precisely what "private property" encompasses for purposes of section 626.9. Whatever else the term means, we believe it cannot reasonably be applied to a sidewalk on an easement of way which has been granted to a public entity. The obvious purpose of the statute is to protect children at and near schools. This purpose would be frustrated if the very public sidewalks upon which schoolchildren walk to school were considered outside the scope of the law. We must interpret the law to give it a " ' "reasonable and commonsense interpretation

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[7] The exception does not apply to persons prohibited from possessing firearms by sections 12021, 12021.1, and sections 8100 and 8103 of the Welfare and Institutions Code. (§ 12026, subd. (a).)

consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." ' [Citations.]" (*In re Reeves* (May 9, 2005) __ Cal.4th __, fn. 9 [2005 Cal.LEXIS 4912]; *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1395.) " 'The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words.' " (*People v. Heffner* (1977) 70 Cal.App.3d 643, 649.)

Moreover, a public sidewalk on an easement of way which has been granted to a public entity cannot fairly be characterized as private property, as that term is used in section 626.9. " 'An easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land.' [Citation.]" (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1269; *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 362; see generally 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 434, p. 614.) "[A] landowner who grants an easement to a governmental entity for public highway purposes possesses no right with respect to passage and travel thereover that is greater than that of the general public." (*People v. Sweetser* (1977) 72 Cal.App.3d 278, 285.) While ownership does not always mean absolute dominion (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1255), " 'the right to exclude persons is a fundamental aspect of private property ownership.' [Citation.]") (*Id.* at p. 1254.) Here, the easement was an interest in the land, apparently owned by a public entity, and entitled to be enjoyed by the public. Tapia, or his father, did not have exclusive rights over the sidewalk, nor was it protected from public appropriation.

b. *Vagueness.*

Tapia argues that, assuming a sidewalk on an easement of way granted to a public entity is not private property within the meaning of the statute, section 626.9 is unconstitutionally vague. We disagree.

"Due process requires fair notice of what conduct is prohibited. A statute must be definite enough to provide a standard of conduct for its citizens and guidance for the police to avoid arbitrary and discriminatory enforcement. [Citations.] 'Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.' [Citation.]" (*People v. Townsend, supra,* 62 Cal.App.4th at pp. 1400-1401; see also *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115; *People v. Ervin* (1997) 53 Cal.App.4th 1323, 1328.) The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations.]" (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

The starting point of our analysis is the presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. (*People v. Ervin, supra,* 53 Cal.App.4th at p. 1328; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1403 [the constitutionality of a statute designed to protect the public from dangerous weapons must be sustained if possible].) A statute will not be held void for vagueness if any reasonable and practical construction can be given its language, or if its terms may be made reasonably certain by reference to other definable sources. (*People ex rel. Gallo v. Acuna, supra,* 14 Cal.4th at p. 1117; *People v. Townsend, supra,* 62 Cal.App.4th at p. 1401.) Reasonable specificity is all that is required. (*People ex rel. Gallo v. Acuna, supra,* at p. 1117; *People v. Townsend, supra,* at p. 1401.) The fact that a statute contains "one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face [citation] . . . ." (*In re Jorge M.*

(2000) 23 Cal.4th 866, 886; *People v. Hazelton* (1996) 14 Cal.4th 101, 109.) " 'Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear.' [Citation.]" (*People v. Townsend, supra,* at pp. 1401-1402.)

Applying these principles to section 626.9 under the circumstances of the instant case, we conclude the statute is not unconstitutionally vague. The legislative purpose of the statute to protect children from firearms should be readily apparent to an ordinary person. (See *People v. Townsend, supra,* 62 Cal.App.4th at p. 1401 [even where a statute contains "somewhat imprecise language, secondary sources such as legislative history may clarify statutory terms sufficiently to meet the constitutional requirement of fair notice. [Citations.] 'This analytical framework is consistent with the notion that we "require citizens to apprise themselves not only of statutory language, but also of legislative history, subsequent judicial construction, and underlying legislative purposes." ' [Citations.]"]; *People v. Fannin, supra,* 91 Cal.App.4th at p. 1401.) As we have explained, allowing firearms on the very sidewalks upon which children walk to and from school could hardly be understood to further this legislative purpose. The property in question was subject to an easement of way, owned, apparently, by a public entity. Thus, any property interest owned by Tapia's father was not of a sort that a reasonable citizen would understand to be private.

Accordingly, because Tapia's defense that the sidewalk was private property was not viable, the trial court did not infringe his right to present a defense by excluding evidence on the topic. (Cf. *People v. Dillard* (1984) 154 Cal.App.3d 261, 267.)

c. *The instructional error was harmless beyond a reasonable doubt.*

Likewise, the trial court's erroneous instruction was harmless beyond a reasonable doubt, for two reasons. (See *People v. Jimenez, supra,* 33 Cal.App.4th at p. 62 [applying reasonable doubt standard to trial court's failure to instruct the

jury to determine whether a private driveway was a public area].) First, because the sidewalk was not private property within the meaning of section 626.9 as a matter of law, it is clear beyond a reasonable doubt that Tapia would not have achieved a more favorable result had the trial court omitted the challenged language.

Second, even if the sidewalk had constituted private property, Tapia did not fall within the ambit of section 626.9's private property exception. Under the plain language of the statute, the private property exception applies *only* if the possession occurred on private property *and* the "possession of the firearm is otherwise lawful." (§ 626.9, subd. (c)(1).) Here, if Tapia possessed the firearm as described by the officers, his possession could not have been "otherwise lawful." As noted, section 12031, subdivision (a)(1) provides that a "person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person . . . *while in any public place or on any public street* in an incorporated city . . . ." (Italics added.) According to the officers, Tapia was carrying a loaded firearm on the sidewalk in front of the house. As we have explained, "public place," for purposes of section 12031, does not necessarily mean public property, but refers to an area accessible to the public. (*People v. Vega, supra,* 18 Cal.App.3d at p. 958 [market parking lot was a public place for purposes of section 12031]; cf. *People v. Green, supra,* 15 Cal.App.3d at p. 771 [private hospital's parking lot was a public place because it was accessible to members of the public]; *In re Zorn, supra,* 59 Cal.2d at pp. 651-652 [for purposes of ordinance prohibiting intoxication in "any public place," barbershop was a public place as it was open to general use, participation, and enjoyment]; *People v. Jimenez, supra,* 33 Cal.App.4th at pp. 57-58 [public area, for purposes of Health and Safety Code section 11353.6, includes those portions of private property which are readily accessible to the public].) It was undisputed that the sidewalk was readily accessible to, and used by, the public.

Tapia counters that this analysis fails to take into account *his* side of the story – i.e., that he was *not* on the sidewalk but was in the yard opening the gate, and did not have the gun, when officers arrived. But if the jury had credited this account, it could not have convicted him of possession of the firearm, in that he claimed he did not have the gun in his possession.

[END PUBLISHED PORTION OF OPINION]

B. *Denial of Pitchess discovery.*

1. *The trial court's ruling on Tapia's original Pitchess motion was not an abuse of discretion.*

a. *Tapia's first Pitchess motion.*

Prior to trial, Tapia filed two *Pitchess* motions. The first, filed on January 29, 2003, sought records related to arresting officers Wunder and Doster; Officer McBride (who interviewed Santoyo); and several other officers,[8] concerning acts or attempted acts of aggressive behavior, violence, or excessive force; racial bias, gender bias, ethnic bias, or sexual orientation bias; coercive conduct; violation of constitutional rights; the fabrication of probable cause or evidence; the preparation or endorsement of false police reports; falsification of overtime or medical reports; unlawful detention or arrest, false arrest, unlawful search and seizure; planting evidence; false testimony or perjury; and acts of dishonesty or moral turpitude. The motion further sought: "Discipline imposed upon the named officers as a result of the Investigating Department's investigation of any citizen complaint"; "Any other material which is exculpatory or impeaching within the meaning of" *Brady;*[9] and all statements of police officers listed as either complainants or witnesses in regard to the complaints sought in the motion.

In support of the motion, defense counsel described the circumstances allegedly surrounding the May 25, 2002 assault and the May 26, 2002 arrest, and described the police reports memorializing both incidents. Counsel averred that a possible defense would be that Officer Wunder, who wrote the police report regarding Tapia's possession of the firearm on May 26, had falsely claimed in the

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8 The trial court denied review of the records of the other officers, a ruling that is not challenged on appeal.

9 *Brady v. Maryland* (1963) 373 U.S. 83.

report that he saw Tapia standing on the sidewalk and holding a gun. Counsel averred on information and belief that, contrary to Officer Wunder's report, Tapia was not on the sidewalk when the officers observed him but instead was in the yard inside the gate; and Tapia did not possess the handgun, remove it from his pocket, or place it in Santoyo's car.

Counsel's declaration further averred that before transporting Tapia to the police station, Officer Wunder had purposefully wrapped a seat belt around Tapia's arm and pulled it through the outside of the car in a manner that caused Tapia pain, despite the fact Tapia was cooperative. Counsel averred facts suggesting that Officer Wunder's action was motivated by Tapia's refusal to talk to him about the alleged assault that had transpired the previous evening.[10]

Further, counsel averred that Santoyo had lied when he told Officer McBride that Tapia had the gun during the incident with Luggo, and the false statement had been coerced by police. At the time of Tapia's arrest, Santoyo worked as a security guard for a federal contractor, and he had once been suspended from work without pay for nonpayment of a traffic ticket. "[O]fficers at the station" discovered Santoyo's line of work and told him "he could be charged for 'CCW' and that if his boss found out about it he could lose his job." On the other hand, if Santoyo cooperated, i.e., wrote a statement that Tapia had

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10 Counsel averred that Officer Wunder asked Tapia, " 'What happened last night?' " When Tapia responded, " 'At what time,' " Wunder told Tapia " 'not to play with him.' " After Tapia responded to another question, Wunder stated, in "a very aggressive and strong voice to 'stop lying' to him." Tapia stated he did not wish to talk to Wunder any further. At that point, counsel averred, Tapia was handcuffed and placed in the police car. Wunder opened the door, unhitched Tapia's seat belt, wrapped the seat belt around his left arm twice and "pulled it so tight that it was very uncomfortable for Mr. Tapia." Officer Wunder then closed the car door with part of the seat belt outside it and pulled the seat belt tightly from outside the door, causing "significant pressure on Mr. Tapia's left arm, causing pain."

" 'pulled a gun' " in the incident with Luggo, the officers "might talk to the sergeant so that he would be released." Santoyo "panicked" and falsely stated that Tapia had exited the vehicle with Santoyo's gun. On May 29, 2002, Santoyo attempted to retract his statement, as evidenced by a follow-up report written by another officer.

The City Attorney, on behalf of the Los Angeles Police Department (L.A.P.D.), conceded that Tapia had shown good cause for discovery of complaints against Officer Wunder regarding falsification of reports. It otherwise opposed the motion.

After a hearing, the trial court ruled the defense had shown good cause for an in camera review of Officer Wunder's records related to false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, giving false testimony, and committing perjury, but not for review of records related to allegations of excessive force. It also granted the motion as to complaints against Officer McBride for employing coercive tactics or techniques in obtaining statements against witnesses. It found Tapia had failed to establish good cause for review of the other officers' records, and denied the motion as to them. The trial court thereafter conducted an in camera review of the officers' records. One discoverable complaint against Officer McBride and five discoverable complaints against Officer Wunder were ordered disclosed.

b. *The limitation of the requested in camera review was proper.*

Tapia contends the trial court erred by (1) excluding from the scope of the in camera review complaints about Officer Wunder's use of excessive force; and (2) "denying discovery of Officer Doster's personnel records." We disagree.

(i) *Relevant legal principles.*

Pitchess established that a criminal defendant may, under some circumstances, compel discovery of information in a law enforcement officer's personnel file where such evidence is relevant to the defendant's ability to defend

against a criminal charge. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219; *Pitchess v. Superior Court, supra,* 11 Cal.3d 531; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019 (*California Highway Patrol*).) The *Pitchess* holding was later codified in sections 832.7 and 832.8 and Evidence Code sections 1043 and 1045. (*People v. Mooc, supra,* at pp. 1219-1220; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1037-1038.)

Evidence Code sections 1043 and 1045 establish a two-step procedure for a criminal defendant's discovery of peace officer records. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472-1473; *California Highway Patrol, supra,* 84 Cal.App.4th at p. 1019; *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 9 (*Brandon*).) First, pursuant to Evidence Code section 1043, the defendant must file a written motion for discovery, including a description of the type of information sought, and supported by affidavits showing, among other things, good cause for the discovery and setting forth the materiality of the requested information to the subject matter of the pending litigation. (*People v. Mooc, supra,* 26 Cal.4th at p. 1226; *California Highway Patrol, supra,* at p. 1019.) The threshold for discovery embodied in Evidence Code section 1043 is "relatively low." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83 (*City of Santa Cruz*); *Brandon, supra,* at p. 10.) The accused " 'may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' [Citation.]" (*City of Santa Cruz, supra,* at pp. 84-85; *Brandon, supra,* at p. 9; *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 104-105.)

"A showing of 'good cause' requires defendant to demonstrate the relevance of the requested information by providing a 'specific factual scenario' which establishes a 'plausible factual foundation' for the allegations of officer misconduct committed in connection with defendant. [Citations.]" (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1020; *People v. Collins* (2004) 115

Cal.App.4th 137, 151; *City of Santa Cruz, supra,* 49 Cal.3d at pp. 85-86; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1146-1147.)[11] The party seeking discovery bears the burden of establishing good cause. (*City of Fresno v. Superior Court* (1988) 205 Cal.App.3d 1459, 1473.) The Legislature's intent in establishing the good cause requirement was to protect peace officer personnel records against " 'fishing expeditions' " conducted by the defense. (*California Highway Patrol, supra,* at p. 1024.)

If a defendant shows good cause, the trial court examines the material sought in camera to determine whether disclosure should be made. (Evid. Code, § 1045, subd. (b); *People v. Mooc, supra,* 26 Cal.4th at p. 1226; *City of Santa Cruz, supra,* 49 Cal.3d at p. 83; *City of Los Angeles v. Superior Court (Davenport)* (2002) 96 Cal.App.4th 255, 260 (*Davenport*).)

Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court's ruling for abuse. (*People v. Mooc, supra,* 26 Cal.4th at p. 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330; *Davenport, supra,* 96 Cal.App.4th at p. 260.)

(ii) *Limitation on in camera review of complaints about Officer Wunder.*

Tapia challenges the trial court's denial of his *Pitchess* motion for complaints of excessive force against Officer Wunder. He theorizes that "the intentional and habitual use of excessive force and violent behavior by a police officer involves moral turpitude; it evidences a readiness to do evil, a willingness to break the law to achieve one's ends" and therefore is relevant to the officer's credibility. Further, he points to Wunder's act of tightening the seat belt as evidence excessive force was used in this case. He is incorrect.

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11 The California Supreme Court granted review in *Warrick v. Superior Court* (2003) 107 Cal.App.4th 1271, review granted June 25, 2003, S115738, which addressed the specific factual scenario/plausible factual foundation requirements.

"[O]nly documentation of past officer misconduct which is *similar* to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery. [Citations.]" (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1021; *People v. Memro* (1985) 38 Cal.3d 658, 685; *Brant v. Superior Court, supra,* 108 Cal.App.4th at p. 108, fn. 2; cf. *Brandon, supra,* 29 Cal.4th at p. 16.) "[O]ur Supreme Court has indicated that a showing of good cause must be based on a discovery request which is tailored to the specific officer misconduct that is alleged. Thus, 'when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officer is overly broad . . . [instead] "only complaints by persons who alleged coercive techniques in questioning [are] relevant." ' [Citations.]" (*California Highway Patrol, supra,* at p. 1021.)

Excessive force was not an issue in the instant case. Even assuming arguendo that the alleged restraint of Tapia with the seat belt was akin to the use of excessive force, the seat belt incident, and the use of excessive force, was irrelevant to any material issue. The instant matter did not involve a claim that Tapia had resisted officers in self-defense after they used excessive force (see, e.g., *Pitchess v. Superior Court, supra,* 11 Cal.3d at p. 534), nor did the *Pitchess* motion suggest a defense would be that the gun was planted in the car to cover up for Officer Wunder's alleged use of excessive force (e.g., *People v. Gill* (1997) 60 Cal.App.4th 743, 750). The *Pitchess* motion did not dispute that the assault victim informed the police department of the crime. As to the May 26, 2002 arrest, Tapia did not make any damaging admissions to police, and there was no claim Tapia was coerced into making a false confession because of Wunder's method of restraining him with the seat belt. (Cf. *People v. Memro, supra,* 38 Cal.3d at p. 681 [evidence that interrogating officers had custom or habit of obtaining confessions by violence would have been admissible on the question of whether defendant's confession was coerced].)

Moreover, Tapia's suggestion that the purported use of excessive force demonstrates a lack of honesty is questionable. In *People v. Ramos* (1997) 15 Cal.4th 1133, a murder defendant offered evidence in mitigation at the penalty phase of his trial. In rebuttal, the People offered the testimony of a deputy sheriff who worked the night patrol at the jail where the defendant was housed. The deputy testified to an incident in which the defendant made a possible threat and used abusive language. (*Id.* at pp. 1149-1150.) The defendant sought to cross-examine about complaints made against the deputy by inmates "for brutality and harassment." (*Id.* at p. 1179.) The case was governed by pre-Proposition 8 law, which prohibited evidence of character traits other than honesty or veracity to attack a witness's credibility. (*Ibid.*) *Ramos* concluded, "Brutality and harassment do not involve 'honesty or veracity'; nor do these traits appear relevant to credibility in any other respect." (*Id.* at pp. 1179-1180.)

Tapia's reliance on *People v. Wheeler* (1992) 4 Cal.4th 284 and *People v. Harris* (1989) 47 Cal.3d 1047, is likewise misplaced. *Harris* held that after Proposition 8 added article I, section 28, subdivision (d) to the California Constitution, Evidence Code sections 786 and 787 – which prohibit impeachment with acts not culminating in a felony conviction, or with character traits not bearing directly on honesty or veracity – do not apply in criminal matters. (*People v. Harris, supra,* at p. 1081; see also *People v. Mickle* (1991) 54 Cal.3d 140, 168.) *Wheeler* held that prior acts of misconduct not amounting to a felony may be used at trial to impeach a witness, as long as the misconduct evidenced moral turpitude and is not barred by Evidence Code section 352. (*People v. Wheeler, supra,* at pp. 295-297; see also *California Highway Patrol, supra*, 84 Cal.App.4th at p. 1024.)

Wheeler and *Harris* do not require discovery of peace officer records in the absence of a *Pitchess* good cause showing, however. In *California Highway Patrol, supra,* 84 Cal.App.4th 1010, the defendant argued that good cause for discovery had been shown because it was common knowledge that officers lie to

protect each other; an officer's credibility is therefore always at issue; and any records reflecting dishonesty are accordingly material and discoverable. (*Id.* at pp. 1023-1024.) *California Highway Patrol* rejected the argument. *California Highway Patrol* observed that the Legislature enacted the statutory scheme to balance the need of criminal defendants to obtain discovery and the legitimate concerns of peace officers to shield from disclosure confidential information not essential to an effective defense. (*Id.* at p. 1024.) "To grant discovery of peace officer personnel records on the basis that *Wheeler* permits discovery of all personnel records reflecting officer misconduct involving moral turpitude, without requiring defendant to comply with the good cause requirement of Evidence Code section 1043, would have the effect of destroying the statutory scheme." (*Ibid.*)[12] *California Highway Patrol*'s reasoning is directly applicable here. The trial court did not abuse its discretion by limiting its review as described.

(iii) *Denial of in camera review of records related to Officer Doster.*

Likewise, the trial court did not abuse its discretion by finding no good cause for review of Officer Doster's records. Tapia's *Pitchess* motion alleged that Officer Wunder had prepared a false police report. It did not, however, accuse Doster of any wrongdoing. The mere fact Doster's partner prepared a report that Tapia claimed was untruthful did not entitle Tapia to a review of Doster's, as well as Wunder's, records. Again, *California Highway Patrol* is instructive. There, several officers participated in the defendant's arrest. A police report prepared by

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12 Tapia's reliance on *People v. Mickle, supra,* 54 Cal.3d at page 168, likewise does not assist him. *Mickle* held that evidence a witness threatened other witnesses was relevant; evidence of threats suggested he was the type of person who would harm others and subvert the court's truth-finding process for selfish reasons, both traits indicative of a morally lax character from which the jury could reasonably infer a readiness to lie. (*Ibid.*) Tapia did not contend that Officer Wunder threatened witnesses.

one officer stated that the defendant had resisted arrest. The defendant alleged the officers used excessive force. The defendant's *Pitchess* motion averred that the credibility of all the officers would be an issue at trial. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1015.) *California Highway Patrol* held the trial court had abused its discretion by ordering production of information related to false police reports prepared by an officer who had participated in the arrest but had not written the allegedly false police report. Good cause had not been established as to that officer, because he was not alleged to have prepared a false report. (*Id.* at p. 1023.)

The same analysis applies here. Tapia's motion did not set forth a factual scenario showing Officer Doster falsified reports or was untruthful about the circumstances surrounding Tapia's arrest, nor do we accept Tapia's argument that it was a foregone conclusion Doster would testify identically to Officer Wunder. It is not uncommon for one officer to observe events differently than another. Nor was the fact Doster was a percipient witness to events enough to establish good cause, as Tapia appears to argue. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1024.) Tapia therefore failed to establish good cause for review of Doster's records, and the trial court's ruling was not an abuse of discretion.

b. *The denial of Tapia's supplemental Pitchess motion was not error.*

(i) *Supplemental Pitchess motion.*

On April 14, 2003, defense counsel moved under seal for supplemental discovery, including: (1) the names, addresses, telephone numbers, and dates of birth of all persons who filed complaints with or who were interviewed by investigators or other L.A.P.D. personnel regarding the categories of complaints previously ordered disclosed; (2) copies of notes, statements, and information obtained from complainants and police officer witnesses to the events underlying the complaints; (3) copies of notes, statements, interviews, and other information obtained from the subject officers; (4) copies of all investigative reports, findings,

and transcripts of disciplinary or other proceedings regarding complaints; and (5) "Any other" exculpatory or impeaching evidence within the meaning of *Brady v. Maryland, supra*, 373 U.S. 83. Defense counsel averred in a declaration that although the defense had been provided with the names, addresses, and telephone numbers for most of the witnesses and complainants, that information was insufficient.

Counsel's declaration in support of the motion detailed the efforts made to contact each witness and stated witness statements would assist the defense in a variety of ways.

The City Attorney, acting on behalf of real party in interest the L.A.P.D., opposed the motion on the ground that Tapia had failed to show due diligence in contacting the witnesses using the provided information.

After the motion was filed, new counsel was appointed for Tapia after the Public Defender declared a conflict. A hearing on the supplemental *Pitchess* motion was conducted on June 2, 2003. Tapia's new attorney stated that additional efforts might have been made to locate witnesses after the supplemental motion was filed, but indicated he was still exploring the matter. The trial court expressed concern that the defense had failed to show sufficient efforts to contact witnesses and complainants, and its tentative ruling was to deny the motion, "except possibly [as to] one or two civilians, if the defense were to make a greater case." The trial court stated that it was taking the supplemental *Pitchess* motion off calendar, "with the admonition to the defense that if you find something that you feel justifies this, you can refile." The matter was put over to June 10th, when the trial court indicated it would "make a final decision on whether a supplemental *Pitchess* has to be ordered in this case."

At the June 10, 2003 hearing, the trial court observed that the defense had not filed any additional motion. Defense counsel indicated he had reviewed the file and had not discovered evidence of due diligence besides that indicated in the

original motion. Defense counsel indicated he was "just going to submit on the supplemental *Pitchess*" motion that had already been filed. The trial court stated, "[I]t was my initial reaction that, you know, not enough steps had been taken to justify granting [the supplemental *Pitchess* motion]. But, you know, it's a very lengthy motion. It involves a lot of things." The trial court requested that defense counsel "highlight to me those that you think . . . are sufficient, because otherwise I'm going to take the matter off calendar and I'm going to say you just haven't met your burden of proof." Defense counsel responded, "That's fine." The trial court again stated its view that the efforts detailed in the supplemental *Pitchess* motion were insufficient. Defense counsel stated, "I agree." The trial court indicated it was taking the matter off calendar "with the admonition to the defense that if you find something that you feel justifies this, you can refile."

Defense counsel did not file an additional motion, and the record does not reflect any further hearings on the issue. The trial court's minute order for June 10, 2003, stated, "Defense counsel submits on the papers in the court's file as to the supplemental *Pitchess* hearing. [¶] *Pitchess* hearing is taken off calendar."

(ii) *Waiver by failing to obtain a ruling below.*

Initially, the People contend that Tapia failed to secure a ruling on the supplemental *Pitchess* motion below, and therefore his claim of error has not been preserved. (*People v. Rowland* (1992) 4 Cal.4th 238, 259 [when defendant does not secure a ruling, he does not preserve the point].) Although the record is somewhat ambiguous, we believe the People's contention lacks merit. The trial court stated that unless defense counsel highlighted specific areas in which he believed the defense had shown sufficient efforts to locate witnesses, it would "take the matter off calendar *and I'm going to say you just haven't met your burden of proof.*" (Italics added.) Defense counsel declined to provide the additional information, and the trial court took the matter off calendar as it said it would. Reading the colloquy in context, the only fair reading is that the trial court

found the defense had expended insufficient efforts to locate the witnesses and complainants.

(iii) *Relevant legal principles.*

Although not required by the statutory scheme, in the context of a *Pitchess* motion courts typically have "refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead . . . that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." (*City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at p. 84; *Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1112; *City of Azusa v. Superior Court* (1987) 191 Cal.App.3d 693, 696-697 [where plaintiffs in a tort/civil rights action made no showing of witness unavailability or inability to recall, "production of more than names and addresses [was] premature"]; *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 828-829; *Carruthers v. Municipal Court* (1980) 110 Cal.App.3d 439, 441-442; see also *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1090.) This judicially-created limitation was implicitly approved in *City of Santa Cruz, supra*, 49 Cal.3d at page 84, which observed that the practice of limiting disclosure to such identifying information operated as "a further safeguard" of officers' privacy interests. (*Ibid.*; see also *Alford v. Superior Court, supra*, 29 Cal.4th at p. 1039 [quoting *City of Santa Cruz*]; *Haggerty v. Superior Court, supra*, at p. 1090.) The limitation also "seeks to ensure a defendant will not rely solely on prosecution investigation efforts . . . ." (*Haggerty v. Superior Court, supra*, 117 Cal.App.4th at p. 1090.) The "central rationale underlying the rule limiting discovery to witness identifying information is that the actual documents of third party complaint information often have minimal relevance and constitute a substantial invasion of officer privacy." (*Ibid.*)

"Nonetheless, the practice of disclosing only the name of the complainant and contact information must yield to the requirement of providing sufficient

information to prepare for a fair trial." (*Alvarez v. Superior Court, supra,* 117 Cal.App.4th at p. 1112.) A defendant may obtain further discovery, such as witness statements, upon a showing identifying information alone will be inadequate to enable preparation of the defense case. (*Kelvin L. v. Superior Court, supra*, 62 Cal.App.3d at pp. 828-829; *Carruthers v. Municipal Court, supra*, 110 Cal.App.3d at p. 442; *City of Azusa v. Superior Court, supra,* 191 Cal.App.3d at pp. 696-697; cf. *Haggerty v. Superior Court, supra*, 117 Cal.App.4th at p. 1090.) For example, further discovery has been found warranted where complainants or witnesses were unavailable, were unable to recall the details of the events in question, or refused to speak with defense counsel. In *Pitchess v. Superior Court, supra*, 11 Cal.3d 531, for example, the defendant presented affidavits stating that two complainants were "unavailable for interview" and two other witnesses could not "recall the details of the events which transpired some time ago." (*Id.* at p. 537.) Based upon this showing, the California Supreme Court ordered disclosure of additional information. (*Id.* at pp. 537-538.)

More recently, in *Alvarez v. Superior Court, supra,* 117 Cal.App.4th 1107, the defendant was prosecuted for resisting arrest. He was provided, pursuant to a *Pitchess* motion, with the name of a deputy sheriff who had filed a complaint of workplace violence against one of the sheriffs who had arrested the defendant. When contacted by the defense investigator, the complaining deputy refused to discuss the incident that had formed the basis of his complaint. (*Id.* at p. 1109.) The defendant then sought discovery of the complainant's statement about the incident. The appellate court held the request for supplemental discovery should have been granted. It rejected the view that the deputy's refusal to cooperate did not constitute unavailability. "The argument that *Pitchess* [*v. Superior Court*], *supra*, 11 Cal.3d at page 537 and *City of Azusa v. Superior Court, supra*, 191 Cal.App.3d at pages 696-697, held that a defendant is *only* entitled to additional discovery if the complainant either can not be located or can not remember the

events is based upon a crabbed reading of those decisions." (*Alvarez v. Superior Court, supra*, at p. 1114.) To the contrary, the deputy's refusal to speak "renders it impossible for petitioner to pursue his investigation just as if the deputy were unavailable or lacked memory." (*Ibid.*)

(iv) *The trial court did not abuse its discretion by denying supplemental discovery.*

Here, Tapia failed to show the witnesses in question were unavailable, uncooperative or unable to recall events, nor did he establish any other circumstance justifying additional disclosure. The defense investigator had sent form letters asking officers who were witnesses to the events that had formed the basis of complaints to contact him. None of the officers contacted the defense investigator, and one of the letters was returned as undeliverable. No further efforts were made to contact the officers. A showing that an officer did not reply to a single form letter is not the equivalent of the officer's refusal to speak with the defense. These facts do not demonstrate unavailability or that the identifying information alone is inadequate to prepare for trial.

Nor are we convinced by the argument that police officers listed as *Pitchess* witnesses almost always fail to respond to defense attempts to interview them, and therefore their witness statements should be released as a matter of course. While it may indeed be true that law enforcement officers generally decline to make themselves available to the defense under these circumstances, we cannot say the practice is so universal that, as a matter of law, the defense need make no showing whatsoever that its efforts to speak with officers have been unavailing. Further, to the extent Tapia sought the conclusions of any officer investigating a complaint, he was not entitled to this material. (Evid. Code, § 1045, subd. (b)(2); *Haggerty v. Superior Court, supra,* 117 Cal.App.4th at p. 1088; *People v. Mooc, supra,* 26 Cal.4th at pp. 1226-1227; *City of Santa Cruz, supra,* 49 Cal.3d at p. 83.)

Nor has Tapia established a need for further information in regard to civilian witnesses. In some instances, Tapia's investigator successfully interviewed the named witnesses, obviating the need for complaints memorializing their statements. In others, the defense investigator sent the same form letter discussed above, and received no response. The remainder of the investigator's efforts can be briefly summarized. He determined that one of the telephone numbers provided had been disconnected, and one witness had moved without leaving a forwarding address with his sister. He left a message on one witness's answering machine, but had not received a response. He telephoned another witness, but no one answered. He learned another witness was incarcerated in Oakland. In none of these instances did the defense investigator take additional steps to locate the witnesses.

Tapia argues that his efforts to contact witnesses were reasonable, and that the trial court required "more than a reasonable effort." Assuming arguendo that a "reasonable efforts" standard, rather than a due diligence or some other standard is the appropriate benchmark, Tapia's argument fails. Simply sending a letter or making a telephone call and then ceasing one's efforts cannot be described as "reasonable" efforts. To the contrary, the defense's efforts are better characterized as superficial and half-hearted. If the measures undertaken here were deemed reasonable, it is difficult to imagine what would not be. The trial court did not abuse its discretion by concluding the efforts detailed by the defense failed to establish the identifying information was inadequate.

To the extent Tapia intends to argue the statutory *Pitchess* procedures violated his due process rights and the principles articulated in *Brady v. Maryland, supra*, 373 U.S. 83, we considered and rejected this contention in *People v. Gutierrez, supra,* 112 Cal.App.4th at pages 1473-1476.

C. *Limitation on cross- examination of Officer Wunder.*

In a related vein, Tapia asserts that the trial court erred by limiting defense counsel's cross-examination of Officer Wunder at trial, in violation of his Sixth Amendment confrontation clause rights. We are unpersuaded.

1. *Additional facts.*

During cross-examination of Officer Wunder, defense counsel asked why Wunder had described Tapia as Hispanic, in a line of questioning apparently aimed at suggesting to the jury that the officer harbored racial bias against Latinos. Defense counsel then queried whether Wunder had ever been disciplined by the L.A.P.D. Wunder replied, "Yes." The prosecutor objected. At a sidebar discussion, defense counsel argued that he hoped to impeach the officer as "either racist or violent or both." It was his belief Wunder had used excessive force, had been involved in shooting a suspect, and was prejudiced against non-whites. The trial court reiterated that "the issue of undue force or violence by the police officer is not an issue." When the trial court asked whether defense counsel possessed evidence to support his allegations, counsel replied, "All I've come up with is some complaints by Latins and a dead Black guy." Defense counsel did not have witnesses who would corroborate his allegations. The trial court observed that such allegations were often groundless. It opined, "I don't know that I can permit you to just smear the officer unless you're prepared to support your allegations." Defense counsel admitted there was no evidence Wunder had used force or violence during the arrest. The trial court suggested that the line of questioning was therefore irrelevant. The trial court offered to review any complaints the defense had uncovered, but defense counsel stated, "I don't have the full complaints. I have bits and pieces." Defense counsel also stated his belief that Wunder, along with other officers, had been sued in a wrongful death case alleging excessive force. The trial court indicated it would not allow defense counsel to "embark [ ] on a wild goose chase" and admonished defense counsel not to pursue the line of questioning.

2. *Discussion.*

Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Heard* (2003) 31 Cal.4th 946, 973.) A trial court is vested with wide discretion in determining relevance and weighing the prejudicial effect of evidence against its probative value. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385; *People v. Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) We review a trial court's rulings on the admissibility of evidence under the abuse of discretion standard (*People v. Waidla* (2000) 22 Cal.4th 690, 723), and will not overturn them in the absence of a showing of clear abuse. (*In re Ryan N.*, *supra*, at p. 1385.)

"Under the Sixth Amendment to the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his accusers. A criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 318.)" (*In re Ryan N., supra,* 92 Cal.App.4th at p. 1385.)

The trial court did not abuse its discretion here. Defense counsel stated that he hoped to impeach Officer Wunder as "racist or violent or both." But as we have explained, evidence of Officer Wunder's past use of excessive force in other incidents – if any such incidents existed – was irrelevant to the issues at trial. As defense counsel admitted, there was no excessive force allegation in the instant matter. Tapia was not making a claim of self-defense in which the officer's propensity for violence might have been relevant. (See Evid. Code, § 1103).

There was no allegation the officers lied to cover up a use of excessive force. Wunder's possible use of excessive force in another case therefore had no relevance to the issues presented at trial.

Evidence that Officer Wunder exhibited racial bias could have been relevant if offered to show Wunder lied about his observations of Tapia due to racial animus. (Evid. Code, § 780, subd. (f).) However, defense counsel's offer of proof and discussion with the trial court demonstrated he did *not* know why Wunder had been disciplined. Defense counsel's view that Wunder was biased was based upon unspecified "complaints by Latins." Defense counsel's offer of proof was simply insufficient to show that the prohibited line of questioning was relevant to any possible racial bias on the part of Wunder, and therefore the trial court did not abuse its discretion by limiting cross-examination accordingly. "[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946; *People v. Sapp* (2003) 31 Cal.4th 240, 290; *People v. Hillhouse* (2002) 27 Cal.4th 469, 494; *People v. Hines* (1997) 15 Cal.4th 997, 1047; *In re Ryan N., supra,* 92 Cal.App.4th at p. 1386.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624; *People v. Frye, supra,* at p. 946; *People v. Hillhouse, supra,* at p. 494; *In re Ryan N., supra,* at p. 1386.) Tapia has failed to make such a showing.

[END NONPUBLISHED PORTION OF OPINION]

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.